

## REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
Signature <i>[Handwritten Signature]</i>	
Date <i>23/8/2019</i>	

CASE NO: HCA05/2018

In the matter between:

**MATIMU HLUNGWANI****APPELLANT**

and

**MINISTER OF POLICE****RESPONDENT**

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**JUDGMENT**

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**MAKGOBA JP**

- [1] This appeal is about the quantum of damages arising out of the unlawful arrest and assault on the Appellant by members of the South African Police Service (SAPS). The Magistrate's Court for the district of Phalaborwa held at Phalaborwa made a finding on the merits that the Appellant was unlawfully arrested and assaulted by the Police and made an order that the Respondent should pay a globular amount of R 30 000.00 for both the unlawful arrest and assault. Aggrieved by the Court *a quo*'s order in respect of the quantum of damages, the Appellant approaches this Court on appeal against the Magistrate's judgment and order made on 21 September 2017.
- [2] The action instituted by the Appellant against the Respondent was undefended in the Court *a quo* as well as before us on appeal. In short, the allegations of unlawful arrest and assault on the part of the Appellant remained uncontested as the Defendant did not put up any version.
- [3] The brief background to the incident is that:
- 3.1. On the 19 May 2015 at about 17H30 to 18H00 the Appellant was walking along the road at Majeje, when he was stopped, questioned and apprehended by two members of the South African Police Service (SAPS). He was forced into a Nissan Hardbody motor vehicle that the

policemen were travelling in. He was accused of knowing something about certain firearms but was not given any opportunity to give his own explanation whether he had any knowledge of the firearms.

He was taken to a nearby bush near the R 40 Road between Phalaborwa and Hoedspruit where he was assaulted and questioned about the whereabouts of the firearms he did not know.

- 3.2. Upon arrival at the bushes the Appellant's hands were tied with cable ties and his feet tied with a rope. They then picked him up and put him at the back of the police van, where the rope hanging loose from his feet was used to hang his feet on the steel bars at the back of the bakkie. His legs were hanging in the air while he was made to lie on his back. While this was happening the policemen continued to question him about the whereabouts of the firearms. One of the men went to another motor vehicle and returned with a bag full of hard clear plastic bags which were subsequently used to suffocate him.

While one person was suffocating him the other would be sitting on his back pressing him down.

- 3.3. The plastic bags would be changed at intervals when they got wet. They continued assaulting him and made him feel pain all over his body. They took him to his residence at 22H00 to 23H00 where they searched his house but could not find anything they were looking for. After they completed searching at his homestead he was assaulted

again with fists on his face. They took him back to the bushes where the assault and suffocation continued. The assault went on and on until the Appellant involuntarily defecated.

3.4. Subsequently they stopped assaulting him, cut the rope on his legs and put him back into the motor vehicle as he could not walk. The cable ties were removed from his wrists and he was bleeding on his wrists. They drove him back to his homestead where he was dropped off at about 3H00 or 4H00 at dawn.

3.5. He sustained injuries in the form of wounds as a result of the assault. He felt pains on his legs and knees and had cuts and bruises on his wrists. He was losing his breath because of the pain and injuries sustained.

3.6. The Appellant was treated by a doctor at the hospital. A medical report in the form of Form J88 was completed by a doctor at Maphutha L Malatji Hospital. The description of the injuries as noted on the J88 form is consistent with the manner in which he was assaulted.

[4] It is common cause that the Appellant was held up or detained by the Police for a period of about 5(five) hours while undergoing the aforesaid ordeal. The Appellant was never taken to a Police Station or charged with any offence.



- [5] It is clear that the Appellant's personal liberty including his right not to be arbitrarily arrested without a lawful cause, the right to dignity and the right to his reputation had been violated by the unlawful arrest and subsequent assault . Appropriate damages should be awarded.
- [6] The members of the SAPS who are supposed to, amongst others, uphold the law and individual human rights enshrined in the Constitution of the Republic of South Africa, 1996 unlawfully arrested the Appellant and proceeded to assault him until he defecated. This is humiliation of the highest degree.
- [7] In the Magistrate's Court the Appellant claimed damages in an amount of R 100 000.00 for unlawful arrest and R 100 000.00 for assault. The Court *a quo* awarded a globular amount of R 30 000.00; hence this appeal before us.
- [8] This Court is called upon to determine a fair and reasonable amount due and payable to the Appellant as compensation for the unlawful arrest and assault. Determining the monetary value for the infringements of the Appellant's rights in the circumstances of this case is not dependant on simple mathematical or other scientific calculations. Neither is case law very helpful in this regard. However, case law serves only as guidance.

In **Minister of Safety and Security v Seymour** [2007] 1 ALL SA 558 (SCA)

at paragraph 17 Nugent JA said:

*"The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that."*

At page 326 paragraph 20, the learned Judge continues:

*"Money can never be more than a crude solatium for the deprivation of what in truth can never be restored and there is no empirical measure for the loss."*

- [9] Mr Madzhie, Counsel for the Appellant, referred to and made copies available to us of two unreported judgment of the Gauteng Division, Pretoria dealing with quantum in respect of unlawful arrest and assault. These are **Vincent Ngobeni v Minister of Police, Case No. 49069/2013** handed down on 9 February 2016 and **Solomon Ranamani v Minister of Police, Case No. 57737/2016** dated 23 May 2016.

The two cases are comparable with the present case and we have taken them into consideration in our judgment.

- [10] In **Liu Quin Ping v Akani Egoli (Pty) Ltd t/a Gold Reef City Casino 2000 (4) SA 68 (W)**, a businessman who was unlawfully detained for about three hours was awarded R 12 000.00 (about R 20 000.00 in present monetary value)

In **Seria v Minister of Safety and Security and Others 2005 (5) SA 130 (C)**, a professional man who was arrested and detained in a police cell for about 24 hours was awarded R 50 000.00 ( R 55 000.00).

In the aforementioned two cases the damages were solely for arrest and detention. There was no claim for assault like in the present case.

[11] The Court *a quo* in its consideration and assessment of the quantum referred to and compared not less than twenty decided cases, including the Vincent Ngobeni and Ranamani cases referred to in [7] above. Despite this, the Court *a quo* still misdirected itself in awarding a globular amount of R 30 000.00 for both unlawful arrest and assault. This Court is at large to interfere with the Magistrate's discretion in the award of general damages.

[12] In the present case we take the following aspects or factors into account in assessing damages payable to the Appellant:

12.1. The severity of the assault and injuries sustained;

12.2. The manner or mode of assault on the Appellant;

12.3. The torturous manner of the assault on the Appellant;

12.4. The assault endured for a long period of some hours;

12.5. The Appellant had committed no offence;

12.6. The aim of arrest was not to bring the Appellant to justice but a mere torture;

12.7. The Appellant deprived of his liberty for about five hours;

12.8. The assault was humiliating to a point where the Appellant defecated, with his clothing on him.

[13] Taking all the above factors into consideration we are of the view that a fair and reasonable compensation is the following:

13.1. R 40 000.00 for unlawful arrest; and

13.2. R 100 000.00 for assault.

[14] Accordingly, the following order is made:

1. The appeal is upheld with costs.
2. The order of the Court *a quo* is set aside and replaced with the following Order.



2.1. The Defendant is ordered to pay the Plaintiff a total amount of

R 140 000.00 for unlawful arrest and assault.

2.2. Costs of the action.



**E M MAKGOBA**  
JUDGE PRESIDENT OF THE  
HIGH COURT, LIMPOPO  
DIVISION, POLOKWANE

I agree



**A LAMMINGA**  
ACTING JUDGE OF THE HIGH  
COURT, LIMPOPO DIVISION,  
POLOKWANE

**APPEARANCES**

Heard on : 16 August 2019

Judgment delivered on : 23 August 2019

For the Appellant : Mr R N Madzhie

Instructed by : Mongwe Attorneys

c/o Podu Mamabolo Attorneys

For the Respondent : In Default